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No. 86-1236

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOY REE B. MARLOWE BALLAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable in money damages for minor erosion of a riparian owner's land located above the mean high water mark and adjacent to a man-made waterway, where the damage is attributable to wave wash from vessels using the waterway.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-32a) is reported at 806 F.2d 1017. The opinion of the district court (Pet. App. 2a-6a) is reported at 552 F. Supp. 390.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1986. The petition for a writ of certiorari was filed on January 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]This case was previously before this Court as No. 84-1750. On January 26, 1983, the United States appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. On October 23, 1984, that court reversed the judgment and, on March 5, 1985, it denied a petition for rehearing. On May 10, 1985, petitioner filed a petition for a writ of certiorari. On January 21, 1986, after requesting the views of the United States with respect to the jurisdiction

STATEMENT

1. The Atlantic Intracoastal Waterway (AIWW) extends for 475 miles from Cape Fear River, North Carolina, to Saint Johns River, Florida. Authorized by Section 4 of the Rivers and Harbors Act of 1927, ch. 47, 44 Stat. 1018, the AIWW generally follows the Atlantic coastline through low marsh lands between coastal islands and the mainland. The waterway was constructed to improve both commercial and recreational traffic. Localities that were to benefit from the waterway were required to furnish all necessary rights-of-way and to construct and maintain all necessary bridges.

Petitioner owns land located adjacent to the AIWW. In 1931, petitioner's father, her predecessor-in-title, had granted an easement to the State of South Carolina over a tract 320 feet wide and 1,700 feet long in conjunction with the building of the AIWW. Pet. App. 2a, 3a. The easement was conveyed to the State for one dollar. The State then transferred this property interest to the United States.[2]

The AIWW's original channel was 8 feet deep and 75 feet wide at the bottom (Pet. App. 3a). In 1941, the channel was enlarged to a depth of 12 feet and a width of 90 feet (*ibid.*).

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of the court of appeals to hear the appeal, the Court granted certiorari, vacated the judgment, and remanded the case for transfer to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. 1631. By order filed March 6, 1986, the case was transferred and subsequently rebriefed and reargued.

[2]The deeds from petitioner's father to the State and from the State to the United States contained a release clause that provided as follows (Pet. App. 3a):

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents, servants, and contractors from any and all claims for damages which may result from the construction and maintenance of the waterway and the deposit of spoil or other matter as hereinabove stated; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his, her, its heirs, successors and assigns.

At the time of the enlargement, 85 feet of the 320-foot easement remained unused (*ibid.*). Subsequently, erosion, which the district court found was primarily attributable to "wave wash from vessels using the AIWW" (*id.* at 4a), extended approximately .046 acre (2,000 square feet) beyond the original easement into petitioner's adjoining property (*ibid.*).[3]

2. In 1982, petitioner brought suit in the United States District Court for the District of South Carolina against the United States and the State of South Carolina. She sought money damages, asserting that the maintenance and use of the waterway had caused the erosion. Petitioner also asked the district court to order the Corps of Engineers to take remedial measures on her property to prevent further erosion. The district court dismissed petitioner's claims against the State and also dismissed the cross-claim filed by the United States against the State because it found no intent in the deed of conveyance from the State to indemnify the United States. Pet. App. 22a.

The district court ultimately rejected (Pet. App. 5a) the government's defense that petitioner's claim was barred by the statute of limitations as well as by the release language of the deed conveying the easement (see note 2, *supra*). The court then held that the erosion was not "a consequential damage for which no compensation can be had" (*id.* at 4a). The district court also held that the government's navigational servitude was not at issue in this case "because the rights of the government are derived from the easements granted" (*ibid.*). Even if the servitude were applicable, the

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[3]The district court, while stating (Pet. App. 4a) that the "primary" cause of erosion was wave wash from vessels using the AIWW, did not identify any other cause for the erosion. Petitioner herself asserts (Pet. 6) that the erosion was caused in part by wave wash and in part by "natural action." Petitioner does not identify any governmental action responsible for the erosion, in whole or in part.

court continued, petitioner would still be entitled to damages because the erosion had occurred on her fast lands (*ibid.*). The district court awarded petitioner $8,804 in damages. This figure included $644 for the eroded land, based on .046 of an acre valued at $14,000 per acre, and $8,160 to protect the property from future erosion (*id.* at 5a-6a).

3. A Fourth Circuit panel reversed (Pet. App. 7a-16a). It agreed with the district court that the release in the document conveying an easement to the State and subsequently to the United States did not preclude petitioner from suing the United States (*id.* at 10a). The court of appeals concluded, however, that the United States was not liable for the damage to petitioner's property (*id.* at 13a).

The court of appeals stated that "[petitioner's] predecessor acknowledged in his grant that the waterway would be part of the 'navigable waters of the United States' " (Pet. App. 12a) and that a "public right of access and use were fully contemplated * * * from the very outset" (*ibid.*). Accordingly, the court held that the "parties to the easement grant and to the transfer thereof contemplated that the situation would be the same after the AIWW had been extended as though it had always existed as a product of natural forces" and that the AIWW "had from the outset of its existence the attributes of a natural, publicly navigable waterway subject to the dominant navigational servitude of the United States" (*ibid.*). The court of appeals further held that there was no showing that the United States had directly and proximately caused the erosion damage to petitioner's property; instead, the damage "was caused by wave wash from passing ships" (*id.* at 13a). Judge Ervin dissented (*id.* at 14a-16a).

4. This Court vacated the judgment of the Fourth Circuit on jurisdictional grounds and the case was transferred to the United States Court of Appeals for the Federal Circuit

(see page 1 note 1, *supra*). That court also reversed the district court's decision (Pet. App. 19a-32a). The court of appeals stated that the question before it was not, as petitioner argued, whether the government may take all of petitioner's upland without paying compensation; rather, it was the "much narrower" question of "who * * * must must defray the cost, found to be $8,160, to provide a revetment stopping the erosion" (*id.* at 23a).[4]

The court concluded, upon examination of the easement granted to the government, that petitioner had no property right that entitled her to government protection from erosion. It observed that the grant stated that the waterway would be " 'public navigable waters' " and " 'navigable waters of the United States' " (Pet. App. 25a). The court determined that "[i]t is therefore natural, and an implied term of the grant, that the grantor should look for guidance as to his property rights to those of upland owners adjacent to natural waterways which have been developed for navigation" (*ibid.*). The court noted that such owners along natural waterways would not be entitled to government protection from wave erosion (*id.* at 26a). It held that petitioner has no greater rights under the easement (*id.* at 26a-27a). Judge Bissell dissented (*id.* at 30a-32a).

ARGUMENT

The court of appeals correctly held that the United States is not liable in money damages for erosion of petitioner's property. The decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

As the court of appeals explained, this case presents the narrow factbound question whether petitioner, under the terms of an easement permitting the government to develop

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[4]A "revetment" is a general term to describe the shoring up of an embankment by any of several means.

a public navigable waterway adjacent to her property, is entitled to protection from wave erosion. The court correctly concluded that petitioner is not entitled to such protection. The court, quoting the Fourth Circuit's decision, stated (Pet. App. 25a):

> As a matter of intent, derived from the four corners of the instrument, the parties to the easement grant and to the transfer thereof * * * contemplated that the situation would be the same after the AIWW * * * had been extended as though it had always existed as a product of natural forces.

This is a reasonable interpretation of the parties' intent. The court of appeals' holding, which is tied to the language of a specific property conveyance, does not raise a question of general importance warranting this Court's review.

Petitioner, citing this Court's decisions in *United States* v. *Dickerson*, 331 U.S. 745 (1947), *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), and *Vaughn* v. *Vermilion Corp.*, 444 U.S. 206 (1979), attempts to characterize the court of appeals' decision as resting on a taking of private property that falls outside of the federal government's navigational servitude (Pet. 10-12). However, the court of appeals plainly resolved the case on "much narrower" (Pet. App. 24a) grounds tied specifically to the terms of a particular easement. And in any event, this case does not involve a government invasion of private property comparable to that encountered in *Dickerson*, where the government flooded the claimant's land, or in *Kaiser Aetna* and *Vaughn*, where the government insisted that a privately improved waterway be opened for public use. Here, the claimant granted an easement permitting the public to navigate adjacent waters. The minor erosion of her property (amounting to less that $700 in damage over a six-year

period) is simply a collateral and foreseeable consequence of that consented use. See Pet. App. 26a.[5]

It is, of course, well settled under the Fifth Amendment that "damage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510 (1945). Private parties are not entitled to compensation for "consequential injuries resulting from the exercise of lawful power." *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 510 (1923). See also *Sanguinetti* v. *United States*, 264 U.S. 146, 150 (1924) (denying compensation where "the injury was in its nature indirect and consequential, for which no implied obligation on the part of the Government can arise"). As the court of appeals observed (Pet. App. 26a), the Court of Claims has previously determined that the the type of damage encountered here is noncompensable in the case of a natural waterway. See *Pitman* v. *United States*, 457 F.2d 975 (Ct. Cl. 1972). There is no basis for a different result in this case, where the petitioner's predecessor-in-title granted an easement on the understanding that it would be used to develop a navigable channel for public use. As the Court of Claims has stated in the case of flowage easements, " '[i]f the impounded water were wide enough for waves to build up, and if the land were easily erodible, it would be up to the owner to exact compensation for the added exposure, or else to protect himself by riprapping or other engineering measures * * *.' " *Loesch* v. *United States*, 645 F.2d 905, 913 n.7 (Ct. Cl.), cert. denied, 454 U.S. 1099 (1981) (quoting *Stockton* v.

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[5]Petitioner incorrectly states that the court of appeals conceded that the erosion to petitioner's property resulted from direct government action (Pet. 8). On the contrary, the court of appeals referred to the district court's finding that erosion had been "caused principally by the wash from vessels using the waterway" (Pet. App. 21a).

United States, 214 Ct. Cl. 506, 515 (1977)). The same reasoning applies here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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